UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re: AUTOMOTIVE PARTS ANTITRUST LITIGATION	Master File No. 12-md-02311 Honorable Marianne O. Battani
In re: Wire Harness Cases In re: All Auto Parts Cases THIS DOCUMENT RELATES TO: All Wire Harness Cases All Auto Parts Cases	2:12-cv-00100-MOB-MKM 2:12-md-02311-MOB-MKM

REPLY IN SUPPORT OF THE WIRE HARNESS DEFENDANTS' OBJECTIONS TO, AND MOTION TO MODIFY, MASTER ESSHAKI'S JUNE 18, 2015 ORDER

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PRELIMINARY STATEMENT

Master Esshaki's decision to drastically reduce the number and duration of auto dealer plaintiff depositions was not his idea. The only reason that he revisited his January 21 rulings was, as he explained, that he believed that the Court's statements on January 28 required him to do so. Plaintiffs' arguments disregard the history and context of his ruling. But regardless of the reason for his decision, defendants have explained in great detail why it cannot stand. The auto dealers' response does not support a different result. The Court should modify the June 18 Order to reinstate Master Esshaki's initial ruling and to allow defendants the time that they need to defend themselves in these cases. Up to four witnesses from a particular auto dealer entity – for all fifty defendants in more than thirty cases – is not excessive by any standard.

The Court also should vacate Master Esshaki's ruling that defendants must share outlines of topics with plaintiffs for Rule 30(b)(1) depositions. Plaintiffs do not identify a single case in which a court has ever imposed such a requirement, and their responses confirm that it will merely delay depositions and waste judicial resources.

ARGUMENT

I. MASTER ESSHAKI'S DECISION TO REVERSE HIS PRIOR RULING AND SIGNIFICANTLY REDUCE AUTO DEALER DEPOSITION TIME WAS NOT AN INDEPENDENT DECISION

The auto dealers attempt to portray Master Esshaki's June 18 order as a reasonable "intermediate position" that he reached after reviewing the parties' arguments regarding the appropriate number and duration of auto dealer depositions. The Court should not be so misled. Master Esshaki *only* drastically scaled back the number of auto dealer depositions that he had previously determined were appropriate because he believed that the Court's comments at the January 28 status conference compelled him to do so. *See* May 6 Hr'g. Tr. at 23-25.

Master Esshaki began the May 6 hearing by explaining his belief that he had resolved the

parties' dispute concerning the number and duration of auto dealer depositions on January 21, but that the Court's comments on January 28 "upset the apple cart of what [he] had been doing." *See* May 6 Hr'g Tr. at 4:24-5:6. Throughout the May 6 hearing, Master Esshaki repeatedly referred to what the Court had said at the January 28 status conference as the sole basis for limiting defendants to one Rule 30(b)(1) deposition and one Rule 30(b)(6) deposition. *See* May 6 Hr'g Tr. at 6:13-14 ("the prior order that I made really was no longer valid because of what Judge Battani indicated in our status conference"); *see also id.* at 22:19-20, 24; 24:3.

Moreover, defendants did not originally advocate for three Rule 30(b)(1) depositions and 18 hours of Rule 30(b)(6) testimony, as the auto dealers suggest.[1] Defendants argued that Master Esshaki had already decided that that was the appropriate amount of time, and that the Court's comments did not require him to revisit his prior ruling. May 6 Tr. at 14:11-15:4; 23:9-24. But Master Esshaki adhered to his understanding that the Court had ruled that there would be only one deposition of each end payor and auto dealer plaintiff. He only granted an additional Rule 30(b)(6) deposition because he could not square the Court's comments with the auto dealers' status as corporate entities. May 6 Hr'g Tr. at 24:6-10.

II. THE AUTO DEALERS DO NOT UNDERMINE DEFENDANTS' SHOWING THAT THE TESTIMONY THAT DEFENDANTS SEEK IS HIGHLY RELEVANT

A. The Auto Dealers' Argument That The Details Of Their Transactions Will Not Influence Class Certification Completely Misses The Mark

In defendants' opening brief, defendants cited *five* cases in which courts denied class certification on the ground that the evidence established that to determine whether all class members were impacted by the alleged conspiracy (a required element of their claims), the court had to look at each individual transaction. *See* Defs.' Br. at 12-13. Those cases show that

[1] Defendants sought five Rule 30(b)(1) depositions and 21 hours of Rule 30(b)(6) testimony in January. Defs.' Position Stmt. at 5, 12, No. 2:12-cv-00100, Jan. 12, 2015, ECF No. 261.

evidence regarding variations in the factors that "played a role" in and "influenced the final sales price of each transaction" is crucial to a court's class certification analysis. *See In re GPU*, 253 F.R.D. 478, 491, 504 (N.D. Cal. 2008). Without attempting to distinguish those cases, the auto dealers argue that even if the details of the auto dealers' transactions show that there are differences in the "damages" that they suffered, they will still be able to certify their proposed class. Thus, they argue that "the details of Dealers' transactions will not affect the ultimate trajectory of this case" and, therefore, requiring additional testimony "would be unnecessary and unjustifiably burdensome." ADP Opp. at 21. The auto dealers are wrong as a matter of law.

The fundamental flaw in the auto dealers' argument is that it is based entirely on the amount of damages, rather than the fact of damage. *See id.* at 20 ("any minor differences in *damages* suffered by a certain Dealer will not undermine their ability to show that common questions predominate." (emphasis added)). In an antitrust case, however, impact (or fact of damage) and the amount of damages are different concepts. Impact, which is "individual injury," is an element of the cause of action. *In re Hydrogen Peroxide*, 552 F.3d 305, 311 (3d Cir. 2008) ("[T]o prevail on the merits, every class member must prove at least some antitrust impact resulting from the alleged violation."). By comparison, the amount of damages merely measures the *extent* of impact. For that reason, some courts have held that a class may be certified if the measure of damages for each class member requires some individual evidence, but only if the plaintiffs have already established that they can prove class-wide impact (i.e. that all class members suffered some damage) through common evidence. *See In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 19 n.18 (1st Cir. 2008).[2] A class cannot

[2] The auto dealers' cases prove defendants' point (and support defendants' motion). The court in *In re Cardizem CD Antitrust Litigation*, 200 F.R.D. 326 (E.D. Mich. 2001), stated that "individual circumstances" that related to "the quantum of damages," would not preclude

be certified if the court must examine individualized evidence to determine whether or not each class member was injured in the first instance. Thus, the auto dealers' argument that the details of their transactions will not influence the Court's class certification analysis is wrong.

B. The Auto Dealers' Claim That Terms Other Than The Sales Price Are Not Relevant To Impact Or Damages Is Also Wrong

The auto dealers argue that the terms of their transactions and other aspects of their businesses are irrelevant, and that all defendants need to know is "the price of the vehicle." ADP Opp. at 14-15. But we are not dealing with widgets sold off the shelf at a list price. As defendants explained in detail in their opening brief (but the auto dealers largely ignore), the purchase and sale of a car – at each level of the distribution chain – is a complicated transaction that is influenced by many factors, each of which is relevant to determining whether, and the extent to which, any of the auto dealers or end payors were injured. Defs.' Br. at 14-19. Defendants cannot even determine the amount that an auto dealer actually paid for a car (net of rebates, incentives, or promotional payments, etc.), or, more importantly, *why it paid the amount that it paid*, without understanding all of the factors that influenced the deal.[3] Similarly, defendants cannot determine whether an auto dealer charged a customer more for a car because of an alleged overcharge that it paid on a car from an OEM (as the end payors claim) without

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certification of a class, but *only* if there already existed "generalized evidence . . . which will prove or disprove th[e] injury element on a simultaneous class-wide basis." *Id.* at 339. In *In re Workers' Compensation*, 130 F.R.D. 99 (D. Minn. 1990), the court explained that "the mere existence of individual questions such as damages does not automatically preclude satisfaction of the predominance requirement, *so long as there is some common proof to adequately demonstrate some damage to each plaintiff*." *Id.* at 108 (emphasis added). *Leyva v. Medline Indus. Inc.*, 716 F.3d 510 (9th Cir. 2013), and *Glazer v. Whirlpool Corp.*, 722 F.3d 838 (6th Cir. 2013), on which the auto dealers also rely, are not antitrust cases, so antitrust impact was not an element of the plaintiffs' claims in either case.

[3] For example, if a dealer purchased a new vehicle for a dealer invoice price of $25,000 but received $5,000 in incentives, rebates, dealer holdback, and/or floor plan financing, the net cost to the dealer was $20,000, not $25,000.

understanding the terms of the whole transaction between the dealer and its customer.

C. Master Esshaki's Ruling On Defendant's Motion To Compel Is Irrelevant

The auto dealers claim that Master Esshaki's decision to deny defendants' motion to compel documents regarding financing, promotions, and auto dealers' monthly payments to OEMs indicates that "terms other than the actual price of a vehicle" are not relevant. ADP Opp. at 15. But that ruling only addressed defendants' motion to compel those particular documents; Master Esshaki did not address the broader question of whether the terms of the auto dealers' purchases and sales are relevant to these cases, as the dealers suggest. *See* Order, 12-cv-00102, Oct. 16, 2014, ECF No. 214. Moreover, since that decision, *the auto dealers have agreed to produce much of the discovery that was the subject of the motion*. *See* Stipulation & Order, 12-cv-00102, May 12, 2015, ECF No. 310. Indeed, Master Esshaki's ruling was based on the auto dealers' false representation at the time that they had no transactional data and that defendants' request was overly burdensome because the dealers would have to review and copy "hundreds of thousands" of voluminous "deal files" and other paper records to find responsive documents. Auto Dealers' Opp. at 2, 4, 12-cv-00102, ECF No. 195. But when defendants later confronted the auto dealers with evidence indicating that that representation was false, the auto dealers agreed to produce both the data and the documents. *See* Jan. 7, 2015 Stip. & Order, 12-cv-00102, Jan. 7, 2015, ECF No. 251. Thus, Master Esshaki's ruling on defendants' motion to compel is not only irrelevant, it is effectively moot.

III. THE AUTO DEALERS' CRIES OF BURDEN ARE EXAGGERATED AND MERITLESS

The auto dealers claim that the deposition time that defendants are requesting is so overwhelmingly burdensome that if the Court reinstates Master Esshaki's January 21 ruling, they may have to abandon their claims in these cases. ADP Opp. at 14. Respectfully, that is

hogwash. These auto dealers are sophisticated corporate entities, many of which have hundreds of employees and generate hundreds of millions of dollars in revenues. Plaintiff Landers, for example, is an extremely large, multi-state network of auto dealers that is part of RML Automotive, which sells 35,000 to 40,000 cars per year, and has $1.4 billion annually in revenue.[4] Plaintiff Commonwealth Motors sells five brands of cars, and has more than 300 employees.[5] And Plaintiff VIP Motor Cars Limited recently won the "Large Business of the Year" award from the Palm Springs Chamber of Commerce.[6]

Each of the dealers has chosen to file *31 separate lawsuits against 50 different defendants*, claiming in each case that it was injured by the various groups of defendants' conduct. Each dealer is obligated to participate in discovery, and to actually prove its claims, in each case. Three individual depositions and 18 hours of Rule 30(b)(6) deposition testimony of each auto dealer entity – *for all 31 cases* – is hardly too much to ask.[7]

IV. PLAINTIFFS DO NOT PROVIDE ANY BASIS FOR THIS COURT TO UPHOLD MASTER ESSHAKI'S DECISION TO REQUIRE DEFENDANTS TO PROVIDE OUTLINES OF TOPICS IN ADVANCE OF RULE 30(B)(1) DEPOSITIONS

The crux of the auto dealers' and end payors' arguments regarding outlines of topics in advance of Rule 30(b)(1) depositions is that defendants should be required to coordinate in

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[4] RML Automotive, "Franklin McLarty Quoted in Automotive News" (May 16, 2014), http://www.rmlauto.com/blog/2014/may/16/franklin-mclarty-quoted--in-automotive-news.htm.

[5] Andrew Newton, *20 Years of Sales, Community Service in Lawrence*, BOSTON.COM (Oct. 19, 2014), http://www.boston.com/cars/news-and-reviews/2014/10/18/years-sales-community-service-lawrence/3fFD52FH830XeEGoei43rI/story.html.

[6] Kia Farhang, *Palm Springs Chamber Honors Local Businesses*, DESERT SUN (June 4, 2015), http://www.desertsun.com/story/news/2015/06/04/palm-springs-chamber-awards/28508213.

[7] Auto dealers' counsel's real concern appears to be the burden on counsel themselves, not their clients. *See* ADP Opp. at 13 n.8 (citing thousands of hours of preparation time, and hundreds of hours of depositions). But, like their clients, auto dealers' counsel chose to play a leadership role in these cases, and they represented to the Court that they had ample resources to handle them. If, in fact, they do not have sufficient resources, the solution is to find other (or additional) counsel, not to deprive defendants of discovery that they need to defend themselves.

advance of depositions. The end payors claim that the Court wanted defendants to coordinate with each other to prepare a list of questions (EPP Opp. at 12-13), and the auto dealers argue that if defendants determine together the topics they wish to cover, it will be less likely that they will need to depose witnesses more than once. ADP Opp. at 24. But neither point is in dispute. Defendants in all auto parts cases have been working together for months to prepare for end payor and auto dealer depositions. The *only* issue in dispute is whether defendants have to share their examination topics with plaintiffs in advance of these depositions. On that issue, the auto dealers' and end payors' arguments provide no legal support for this unprecedented deviation from the Federal Rules of Civil Procedure, and their arguments are otherwise meritless.

Plaintiffs claim that the outlines will help their witnesses be "sufficiently prepared to answer questions on these topics" such that "Defendants will be more likely to elicit relevant facts and evidence," EPP Opp. at 13; *see* ADP Opp. at 24, but they cannot cite a single case in which any court has ever imposed such a requirement on those grounds. Rule 30(b)(1) depositions never involve advance disclosure of examination topics, and witnesses either have personal knowledge of the questions asked and must testify about them, or they do not. That is the nature of a Rule 30(b)(1) deposition (and the difference between a Rule 30(b)(1) deposition and a Rule 30(b)(6) deposition, for which topics are provided in advance).

Moreover, plaintiffs do not mitigate defendants' concern that these outlines will only create further disputes and delay depositions. The end payors avoid the point entirely, and the auto dealers *admit* that there will be "problems" if they believe that a line of questioning does not conform with an outline. ADP Opp. at 25. The auto dealers prove defendants' point.

CONCLUSION

The wire harness defendants respectfully request that the Court enter their Proposed Order Modifying Master Esshaki's June 18, 2015 Order.

Date: July 6, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2015, I caused the foregoing REPLY IN SUPPORT OF THE WIRE HARNESS DEFENDANTS' OBJECTIONS TO, AND MOTION TO MODIFY, MASTER ESSHAKI'S JUNE 18, 2015 ORDER to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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